

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VINCENT A. CEFALU,

Plaintiff,

V.

ERIC H. HOLDER, JR., U.S. Attorney
General, U.S. Department of Justice,

Defendant.

NO. C12-0303 TEH

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court on September 9, 2013, on Defendant's motion for summary judgment. After carefully considering the parties' written and oral arguments, the Court now GRANTS IN PART and DENIES IN PART the motion for the reasons set forth below.

BACKGROUND

This case concerns whether Special Agent Vincent A. Cefalu (“Plaintiff”) was subjected to age and disability discrimination, and retaliation for reporting the alleged discrimination at the hands of his employer, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF” or “Defendant”), an agency within the United States Department of Justice.

Plaintiff joined the ATF in 1987 and alleges he was subjected to wrongful conduct beginning in 2004, when he transferred to the San Francisco Field Division (“SFFD”)’s Dublin, California Field Office. Plaintiff alleges that his supervisors called him the “old guy” and intentionally gave him an older-model, poorly conditioned, lavender Buick to drive. From 2004-2005, he worked on a task force called “American Graffiti,” which targeted drug trafficking in the Modesto area. Plaintiff alleges that a younger Special Agent on that

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1 investigation, Christopher Bort, did less work than Plaintiff yet later received more
2 recognition and awards.

3 In June 2005, Plaintiff's supervisor, Resident Agent in Charge Dennis Downs ("RAC
4 Downs") assigned Plaintiff to work on the Robert Holloway Investigation, a multi-agency
5 task force that included members of the Modesto Police Department. In November 2005,
6 RAC Downs received a request from the Modesto Chief of Police, Roy Wasden, requesting
7 that ATF reassign Plaintiff and replace him with a different ATF Special Agent. On or about
8 November 30, 2005, RAC Downs and his supervisor, Assistant Special Agent in Charge
9 Michael Gleysteen ("ASAC Gleysteen"), met with members of the Modesto Police
10 Department. During the meeting, the officers discussed the general direction of the
11 Holloway Investigation, and according to RAC Downs, Chief Wasden or another member of
12 the Modesto Police Department command staff "made the comment that Agent Cefalu was
13 'caustic,' 'unprofessional,' and 'a cancer' because of his abrasive personality."¹ Declaration
14 of Dennis Downs ("Downs Decl.") ¶ 17. A few days later, ASAC Gleysteen, RAC Downs,
15 Plaintiff, and ATF Special Agent Art Peralta attended a meeting wherein Peralta was
16 assigned as a co-case agent with Plaintiff. Plaintiff said he was "insulted and offended that
17 Agent Peralta would become the lead agent" on the investigation because Peralta "was junior
18 and did not know how to run such an investigation."² Downs Decl. ¶ 19. During the
19 meeting, Plaintiff said he was removing himself from the investigation, but ASAC Gleysteen
20 "corrected him and instructed him that he could not remove himself." Declaration of
21 Michael Gleysteen ("Gleysteen Decl.") ¶ 21. On or about January 6, 2006, Plaintiff
22 informed RAC Downs that he wanted to speak directly with Special Agent in Charge Paul
23 Vido ("SAC Vido"). RAC Downs informed ASAC Gleysteen of this request, which was
24 later denied.

25
26 _____
27 ¹This statement is hearsay, but admissible when offered for its effect on RAC Downs.
28 ²Statements attributed to Plaintiff are admissible as statements of a party opponent.
Fed. R. Evid. 801(d)(2)(A).

1 On January 17, 2006, Plaintiff met with RAC Downs. RAC Downs gave Plaintiff a
2 copy of SAC Vido's written denial of his request for a meeting.³ RAC Downs averred that
3 upon reading the written denial, Plaintiff stated "I went through you, I went through the
4 ASAC, so fuck you." Downs Decl. ¶ 30. Plaintiff maintains that while he probably did say
5 "F- you" to RAC Downs "on occasion from time to time, joking, [in] typical banter," he
6 never told that to him when he was mad. May 8, 2007 Cefalu Dep. at 184:7-19 (Pl.'s Ex. 1).
7 During this meeting, RAC Downs also informed Plaintiff that he was no longer assigned to
8 the Holloway Investigation. Plaintiff testified that during this January 17, 2006 meeting he
9 told RAC Downs that he was en route to file an Equal Employment Opportunity ("EEO")
10 complaint with ATF. *Id.* at 12:6-23. RAC Downs testified that he did not recall Plaintiff
11 telling him he was on his way to make the EEO complaint. May 9, 2007 Downs Dep. at
12 66:20-23 (Bouman Decl. Ex. 25)

13 Later that day, Plaintiff met with an ATF EEO counselor. This meeting had been
14 requested earlier on January 13, 2006. The EEO counselor's notes indicate that Plaintiff
15 alleged age discrimination. Bouman Decl., Ex. 19 at 17. On January 23, 2006, ASAC
16 Gleysteen, in consultation with SAC Vido, transferred Plaintiff from the Dublin Field Office
17 to the Sacramento, California Field Office. Both ASAC Gleysteen and SAC Vido averred
18 that the decision to transfer Plaintiff was made several days prior to learning about Plaintiff's
19 EEO activity. The stated reasons for the transfer were staffing needs and so that Plaintiff
20 could be under the direct supervision of RAC Downs, who was based in Sacramento.

21 Plaintiff reported for duty in Sacramento for several days but subsequently went on
22 medical leave for a pre-existing elbow injury. In late January 2006, ASAC Gleysteen and
23 RAC Downs discussed suspending Plaintiff based on his prior behavior. RAC Downs also
24 referred Plaintiff to ATF's Employee Assistance Program, a confidential system designed to
25 assist employees who have encountered personal problems via letter on February 7, 2006.

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27

³RAC Downs averred that the written denial was dated January 6, 2006, Downs Decl.
28 ¶ 30, whereas other documents indicate it was dated January 12, 2006. *See* Declaration of
Rachel Bouman ("Bouman Decl."), Ex. 19 at 18 ¶ 11. This discrepancy is immaterial.

1 Plaintiff underwent surgery on his elbow on February 10, 2006. Based on prior discussions
2 regarding a proposed suspension, RAC Downs drafted a Notice of Proposal of Suspension
3 for Three Days, dated February 15, 2006. Downs Decl., Ex. E. During this time, Plaintiff
4 was also selected by ATF to report for duty to a six-month detail in Houston, Texas, to assist
5 with Hurricane Katrina-related enforcement activities. RAC Downs averred that he was
6 neither involved with the decision to submit Plaintiff's name for consideration nor with his
7 ultimate selection for the Houston position. On February 21, 2006, RAC Downs gave
8 Plaintiff a copy of the notice of proposed suspension but, based on instructions from ASAC
9 Gleysteen, informed him that the suspension would be held in abeyance pending Plaintiff's
10 completion of the Houston detail. On February 15, 2006, Plaintiff filed his first EEO
11 Complaint. Due to his surgery and medical leave, Plaintiff never reported for duty in
12 Houston.

13 In June 2006, because Plaintiff had failed to qualify with his firearm during the
14 previous two quarters, as was required to by ATF regulations, RAC Downs took away his
15 service weapon. Because Plaintiff could not participate in "live-fire" shooting qualifications
16 due to his elbow injury, Plaintiff asked for qualification using a computerized Firearms
17 Training Simulator known as "FATS." Plaintiff was never allowed to qualify using FATS.
18 Plaintiff had submitted medical documentation indicating he had a permanent elbow injury
19 which made him unable to lift a firearm, and his doctor opined that he could no longer work
20 as a Special Agent. ATF offered him a position as an Intelligence Program Specialist
21 ("IPS") position in Washington, D.C. Plaintiff at first refused this position and ATF moved
22 to terminate his employment. On October 30, 2006, RAC Downs met with Plaintiff,
23 provided him a notice of proposed termination, and collected his ATF-issued Special Agent
24 badge and credentials; he collected an additional badge several days later. Plaintiff,
25 however, reconsidered the IPS position offer and accepted it in November 2006. Plaintiff
26 was given a 90-day transitional period, where he was instructed to report to duty under a new
27 supervisor in Dublin. Plaintiff's second-level supervisor averred that Plaintiff did not report
28 for duty on the first day as ordered and was placed on away without leave ("AWOL") status.

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1 Declaration of Megan Bennett (“Bennet Decl.”), ¶¶ 3-4 & Ex. A at ¶ 14. Plaintiff testified
2 that he informed his first-level supervisor that he had a previously scheduled doctor’s
3 appointment and that AWOL was thus unwarranted. Cefalu Dep. at 149:7-20 (Pl.’s Ex. 1).
4 Ultimately, Plaintiff never moved to Washington, D.C. for the IPS position because he
5 underwent an additional successful surgery on his elbow, went out on further medical leave,
6 and returned as a Special Agent in April 2007. Upon returning, Plaintiff learned that his
7 badges and credentials had been damaged. Plaintiff was issued new badges and credentials.

8 When Plaintiff returned in April 2007 as a Special Agent, the new Special Agent in
9 Charge Stephen Martin (“SAC Martin”) initially contemplated assigning Plaintiff to
10 Sacramento but ultimately assigned him to Dublin where he was given the role of Senior
11 Operations Officer (“SOO”). The SOO was a position occupied by a Special Agent but with
12 responsibility for, among other things, property management, inventory tracking, and
13 management of the vehicle fleet. Plaintiff remained in this position for the next several
14 years. In May 2010, Plaintiff appeared on a segment of CNN’s Anderson Cooper 360°, in
15 which he described how he was paid “good money for not a lot of work,” and had been
16 “idled” in his duties. Def.’s Req. for Judicial Notice, Ex. J (video excerpt of May 27, 2010
17 broadcast). On September 8, 2010, Plaintiff’s supervisor, Division Operations Officer
18 Debora Livingston, delivered a memorandum to Plaintiff outlining the specific work duties
19 that were expected of him.

20 In July 2011, ATF’s Internal Affairs Division and Office of Professional
21 Responsibility and Security Operations (“OPRSO”) suspended Plaintiff for six days on the
22 basis of allegedly racist, sexually explicit, and profane emails discovered in Plaintiff’s email
23 during the course of responding to criminal discovery requests made by the criminal
24 defendants in the criminal trial of Robert Holloway, the same multi-agency investigation to
25 which Plaintiff was earlier assigned. Additionally, during the Holloway criminal trial, the
26 criminal defendants moved to suppress certain evidence on the grounds that the FBI, which
27 eventually replaced the ATF as the federal agency in that investigation, illegally obtained a
28 wiretap. Plaintiff testified in support of Mr. Holloway’s motion and accused other law

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1 enforcement officers of having committed perjury to obtain the wiretap. The district court
 2 denied the suppression motion and described Plaintiff's testimony as "reckless" and
 3 "incompetent," and stated that Plaintiff did a "disservice to the agency that he continues to be
 4 employed by." July 6, 2010 Rep. Tr. of Proceedings on Ruling on Franks Motion, *United*
 5 *States v. Holloway et al.*, No. 08-CR-00224-LJO-DLB (E.D. Cal. 2008) (Def.'s Req. for
 6 Judicial Notice, Ex. H at 46:18-20). ATF's OPRSO reviewed the testimony and
 7 recommended Plaintiff be terminated for lack of candor and conduct unbecoming a Special
 8 Agent. In April 2011, Plaintiff had applied to become Resident Agent in Charge of the Reno
 9 Field Office and was on the Best Qualified List. The Assistant Director removed Plaintiff
 10 from consideration based on a report from OPRSO that Plaintiff was facing pending
 11 discipline.

12 Plaintiff first filed an EEO complaint on February 15, 2006 (Agency Case No. 2006-
 13 00102), which he amended on February 25, March 23, August 16, October 20, and
 14 November 29, 2006. Plaintiff filed an additional EEO complaint on August 4, 2008 (Agency
 15 Case No. 2008-00411), which he amended on November 4, 2010, January 6, 2011, August
 16 12, 2011, and March 8, 2012. Plaintiff filed a third EEO complaint on January 20, 2012,
 17 which he also amended several times.⁴

18 Plaintiff initiated this case on January 19, 2012. Docket No. 1. Plaintiff's asserts four
 19 causes of action in his Second Amended Complaint ("SAC"): (1) age discrimination,
 20 pursuant to the Age Discrimination in Employment Act, § 29 U.S.C. § 623(a), SAC ¶¶ 142-
 21 49; (2) retaliation based on Plaintiff's complaints of age discrimination, *id.* ¶¶ 155-59;
 22 (3) disability discrimination pursuant to the Rehabilitation Act, § 29 U.S.C. § 791, *id.* ¶¶ 150-
 23 54; and (4) retaliation based on Plaintiff's complaints of disability discrimination, *id.* ¶¶ 160-
 24 64. SAC, Docket No. 50.

25 Defendant moved for summary judgment on all claims on August 5, 2013. Docket
 26 No. 86. Upon reviewing the motion, Plaintiff's opposition, Docket No. 114, and Defendant's
 27

28 ⁴Bouman Decl., Exs. 1-18; Mot. at 3-5; Pl.'s Ex. 15. The Court reviews the record
 here *de novo* with no consideration of the results of any prior EEOC proceedings.

1 reply, Docket No. 116, the Court ordered counsel to address specific questions and provide
2 citations to the record during the hearing on the motion, which was held on September 9,
3 2013. Docket No. 118.

4

5 **LEGAL STANDARD**

6 Summary judgment is appropriate when there is no genuine dispute as to material
7 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
8 Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is
10 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The
11 Court may not weigh the evidence and must view the evidence in the light most favorable to
12 the nonmoving party. *Id.* at 255. The Court’s inquiry is “whether the evidence presents a
13 sufficient disagreement to require submission to a jury or whether it is so one-sided that one
14 party must prevail as a matter of law.” *Id.* at 251-52.

15 A party seeking summary judgment bears the initial burden of informing the Court of
16 the basis for its motion, and of identifying those portions of the pleadings and discovery
17 responses that “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof
19 at trial, it must “affirmatively demonstrate that no reasonable trier of fact could find other
20 than for the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.
21 2007). However, on an issue for which its opponents will have the burden of proof at trial,
22 the moving party can prevail merely by “pointing out . . . that there is an absence of evidence
23 to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. If the moving party meets
24 its initial burden, the opposing party must “set out specific facts showing a genuine issue for
25 trial” to defeat the motion. Fed. R. Civ. P. 56(e)(2); *Anderson*, 477 U.S. at 256.

26 A court need consider only the materials cited by the parties. Fed. R. Civ. P. 56(c)(3).
27 A district court has no independent duty “to scour the record in search of a genuine issue of
28 triable fact” and may “rely on the nonmoving party to identify with reasonable particularity

1 the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th
2 Cir. 1996) (internal quotation marks omitted); *see also Carmen v. San Francisco Unified Sch.*
3 *Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (“The district court need not examine the entire
4 file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the
5 opposing papers with adequate references so that it could conveniently be found.”).

6

7 DISCUSSION

8 I. Age Discrimination in Employment Act

9 The ADEA prohibits an employer from discriminating “because of [an] individual’s
10 age.” *Shelley v. Geren*, 666 F.3d 599, 606-07 (9th Cir. 2012) (citing 29 U.S.C. § 623(a)(1)).
11 In an ADEA disparate treatment claim, a plaintiff retains at all times the burden of persuasion
12 to establish, by a preponderance of the evidence, that age was the “but-for” cause of an
13 employer’s adverse action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). The
14 “burden-shifting evidentiary framework of *McDonnell Douglas*” continues to apply to
15 motions for summary judgment on ADEA claims. *Shelley*, 666 F.3d at 607-08 (citing
16 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

17 To survive summary judgment on the ADEA claim, Plaintiff must first establish a
18 prima facie case of age discrimination. *Id.* (citing *Coleman v. Quaker Oats Co.*, 232 F.3d
19 1271, 1280-81 (9th Cir. 2000)). To establish a prima facie case under the ADEA, Plaintiff
20 here must demonstrate that he: (1) was member of the protected class (at least age 40); (2)
21 was performing his job satisfactorily; (3) suffered an adverse employment action; and (4) was
22 replaced by a substantially younger employee with equal or inferior qualifications. *Coleman*,
23 232 F.3d at 1281.

24 If Plaintiff succeeds, the burden of production shifts to Defendant to articulate a
25 legitimate, non-discriminatory reason for its adverse employment action. *Shelley*, 666 F.3d
26 at 608 (citing *Coleman*, 232 F.3d at 1281). “It is then [Plaintiff’s] task to demonstrate that
27 there is a material genuine issue of fact as to whether the employer’s purported reason is
28 pretext for age discrimination. At trial, he must carry the burden to prove that age was the

1 ‘but-for’ cause of his [disparate treatment claim].” *Id.* (internal citation omitted). A plaintiff
2 may meet the burden to show pretext using either direct or circumstantial evidence. *Coghlan*
3 *v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094-95 (9th Cir. 2005). Direct evidence is
4 evidence “which, if believed, proves the fact [of discriminatory animus] without inference or
5 presumption” and usually “consists of clearly sexist, racist, or similarly discriminatory
6 statements or actions by the employer.” *Id.* at 1095 (internal citation and quotation omitted).
7 Circumstantial evidence is evidence that “requires an additional inferential step to
8 demonstrate discrimination” such as by showing the “employer’s proffered explanation for
9 the adverse action is ‘unworthy of credence,’” but circumstantial evidence “must be ‘specific
10 and substantial’ to defeat the employer’s motion for summary judgment.” *Id.* (citing *Godwin*
11 *v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)).

12 Defendant moved for summary judgment motion on numerous factual allegations
13 contained in the SAC that conceivably sound under the ADEA. Plaintiff meets the first
14 element of a prima facie ADEA claim because he was, at all relevant times, over forty years
15 old, Def.’s Resp. to First Reqs. for Admiss. at ¶ 12 (Pl.’s Ex. B) (admitting this element).
16 As discussed below, however, Plaintiff failed to present evidence establishing all required
17 elements of his prima facie case for each complained-of instance of age discrimination. The
18 Court addresses whether summary judgment is warranted for each of these factual “claims.”

19 **1. Government-Issued Vehicle**

20 Plaintiff claims he arrived at the SFFD in 2004 and was given an old, lavender Buick
21 that needed repairs. SAC ¶¶ 29-31. Defendant moved for summary judgment on this claim,
22 and Plaintiff failed to put forth any affirmative evidence relating to it or otherwise address it
23 in his opposition. The Court GRANTS summary judgment on this claim as unopposed.

24 **2. “Old-Guy” Comments**

25 The SAC alleges Plaintiff’s colleagues and supervisors made disparaging remarks
26 about his age, including calling him the “old-guy.” SAC ¶¶ 27-28, 30. Defendant moved for
27 summary judgment on this claim, and Plaintiff failed to cite any evidence that these remarks
28 were made, let alone that they would be anything other than unactionable “stray remarks.”

1 *Merrick v. Farmers Ins. Grp.*, 892 F.2d 1434, 1438 (9th Cir. 1990). Plaintiff did not present
 2 evidence linking such comments to any adverse employment action or decision to replace
 3 Plaintiff with “a substantially younger employee with equal or inferior qualifications.” *Nidds*
 4 *v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). Thus, Plaintiff failed to
 5 establish a prima facie case relating to any “old-guy” comments under the ADEA, and the
 6 Court GRANTS summary judgment on this claim.

7 **3. American Graffiti Investigation**

8 Plaintiff alleges that he did the majority of work on a task force investigation called
 9 “American Graffiti,” which targeted narcotics and firearms trafficking in the Modesto,
 10 California area, while a younger Special Agent, Chris Bort, did less work yet received a
 11 Quality Step Increase (“QSI”) and other recognition. SAC ¶¶ 33-41. Plaintiff failed to
 12 present any evidence establishing that he “was treated less favorably than” Bort or that Bort
 13 was “a similarly situated younger employee.” *Coleman*, 232 F.3d at 1280-81. Thus, Plaintiff
 14 failed to establish his prima facie case.

15 Even if he had met this burden, Defendant articulated a legitimate, non-discriminatory
 16 reason for Bort’s receipt of the QSI. Bort was not similarly situated because he was a GS-11
 17 Special Agent, while Plaintiff was a GS-13 Special Agent. The QSI is awarded to an
 18 employee who “consistently performs at a level above his or her current grade and step
 19 level.” Gleysteen Decl. ¶ 6. RAC Armando Salas averred that he assessed that Bort’s work
 20 performance was two levels higher than his GS-11 grade. Declaration of Armando Salas
 21 (“Salas Decl.”) ¶ 14. As a result, Salas nominated Bort and not Plaintiff for the QSI because
 22 the job description and standards are higher for the GS-13 position than the GS-11 position,
 23 and while Plaintiff performed at an acceptable level based on his GS-13 pay grade and
 24 experience, Bort performed at an exceptional level based on his lower grade. Salas Decl. ¶
 25 15. Plaintiff failed to present any evidence to support the claim that Plaintiff did the majority
 26 of work or that Bort was similarly situated, and also failed to present evidence showing that
 27 RAC Salas’ legitimate, non-discriminatory reasons for Bort’s QSI were pretext.
 28 Accordingly, the Court GRANTS summary judgment on this claim.

1 **4. Robert Holloway Investigation**

2 Plaintiff argues that the appointment of Special Agent Art Peralta as a co-case agent
 3 on the Holloway Investigation and Plaintiff's ultimate reassignment from that case were
 4 instances of age discrimination. Opp'n at 24; SAC ¶¶ 42-53. Plaintiff failed to present
 5 evidence establishing his prima facie case. Plaintiff presented no evidence that demonstrates
 6 Plaintiff was "performing his job satisfactorily" at the time of Peralta's appointment or his
 7 reassignment, aside from the assertion in his opposition brief that he had a successful career
 8 as a Special Agent, Opp'n at 1, and did not receive his first unsatisfactory performance
 9 evaluation until September 2006, Opp'n at 24. Plaintiff additionally presented no evidence
 10 that Peralta was a "substantially younger employee of equal or inferior qualifications."
 11 *Coleman*, 232 F.3d at 1281. Thus, Plaintiff failed to present evidence that establishes the
 12 required elements of his prima facie case.

13 Even if Plaintiff he had met this burden, Defendant articulated legitimate, non-
 14 discriminatory reasons for these challenged actions. Defendant presented evidence that
 15 shows ASAC Gleysteen and RAC Downs appointed Peralta as a co-case agent, and then
 16 removed Plaintiff from the investigation because of requests by local law enforcement due to
 17 Plaintiff's perceived unprofessional behavior and reports of his inability to operate
 18 effectively with local law enforcement officers.⁵ Downs Decl. ¶¶ 11-18; Gleysteen Decl. ¶¶
 19 11-17.

20 Rather than present "specific and substantial" evidence that these proffered reasons
 21 were pretextual, Plaintiff instead argues that Defendant's proffered explanations for
 22 Plaintiff's removal are inconsistent. Opp'n at 24. The two "inconsistencies" cited by
 23 Plaintiff are (1) if Plaintiff was unprofessional and a "cancer" to the investigation, ASAC
 24 Gleysteen would not have prevented Plaintiff from taking himself off the investigation; and
 25 (2) if Plaintiff was incompetent, ASAC Gleysteen would not have kept him on the

26
 27 ⁵To the extent statements made by local law enforcement members to RAC Downs
 28 and ASAC Gleysteen about Plaintiff are hearsay, they are admissible for their effect on RAC
 Downs and ASAC Gleysteen in relation to their decision to appoint Peralta and later remove
 Plaintiff.

1 investigation. Opp'n at 24. These arguments, however, are not “specific and substantial”
 2 evidence of a genuine dispute of material fact that ATF’s purported reasons were pretext for
 3 age discrimination. *Shelley*, 666 F.3d at 607.⁶ Because Plaintiff failed to produce evidence
 4 that established a prima facie case or created a genuine issue of material fact as to pretext,
 5 summary judgment on this claim is therefore GRANTED.

6 **5. Additional Potential ADEA Claims**

7 In the single page of Plaintiff’s opposition brief devoted to applying the ADEA to the
 8 facts of the case, Plaintiff states that he “alleges he suffered numerous adverse employment
 9 actions, since he began working for the SFFD, ‘to include but limited to, being removed as
 10 case agent in the Holloway investigation, being transferred several times, and being removed
 11 from the [Best Qualified List] for the RAC of Reno position.’” Opp'n at 24. Plaintiff’s
 12 opposition brief analyzed only the Holloway Investigation claim, and directed the Court to no
 13 other evidence that attempts to establish an ADEA prima facie case related to the several
 14 transfers and removal from the Best Qualified List for the Reno RAC position, which he cites
 15 as examples of age discrimination. Plaintiff’s also asserts that he has “suffered numerous,
 16 adverse employment actions” and that “[a]ll of Defendant’s legitimate, non-discriminatory
 17 reasons are discussed in the Retaliation section” of Plaintiff’s opposition brief. Opp'n at 24.
 18 Plaintiff’s apparent request for the Court to engage in analysis-by-incorporation for his
 19 ADEA claim, however, is not a substitute for Plaintiff satisfying his burden of presenting
 20 evidence that establishes his prima facie case for age discrimination under the ADEA, and
 21 directing the Court to that evidence with specific citations. He has not done so here.
 22 Summary judgment is appropriate where plaintiff “fail[s] to provide admissible evidence to

23 ⁶Plaintiff cites *Dominguez-Curry v. Nevada Transportation Department*, 424 F.3d
 24 1027, 1037 (9th Cir. 2005) (citing *Godwin*, 150 F.3d at 1220-22) in support of his argument.
 25 However, the plaintiff in that case relied on direct evidence of discriminatory animus;
 26 Plaintiff presents no such evidence here. Additionally, Plaintiff cites *Reeves v. Sanderson*
Plumbing Products, Inc., 530 U.S. 133, 147 (2000) for the proposition that a fact-finder may
 27 infer retaliation from the falsity of an employer’s explanation. Opp'n at 14. A “factfinder’s
 disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied
 28 by a suspicion of mendacity) *may, together with the elements of the prima facie case, suffice*
 to show intentional discrimination.” *Reeves*, 530 U.S. at 147 (emphasis added) (citing *St.
 Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). Plaintiff, however, failed to establish
 the elements of a prima facie case here.

1 establish a genuine issue of material fact regarding the requisite element” of a claim. *Boyd v.*
2 *City of Oakland*, 458 F. Supp. 2d 1015, 1052 (N.D. Cal. 2006). “The district court need not
3 examine the entire file for evidence establishing a genuine issue of fact, where the evidence
4 is not set forth in the opposing papers with adequate references so that it could conveniently
5 be found.” *Carmen*, 237 F.3d at 1031. Thus, Defendant’s motion for summary judgment on
6 Plaintiff’s ADEA cause of action is GRANTED.

7

8 **II. Rehabilitation Act**

9 The Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, prohibits the ATF from
10 discriminating against employees with disabilities. Section 504 of the Rehabilitation Act
11 provides:

12 No otherwise qualified individual with a disability in the United
13 States . . . shall, solely by reason of her or his disability, be
14 excluded from the participation in, be denied the benefits of, or
be subjected to discrimination under any program or activity . . .
conducted by any Executive agency . . .

15 29 U.S.C. § 794(a).

16 Plaintiff asserts one count of disability discrimination under the Rehabilitation Act.
17 SAC ¶¶ 142-49. The Court can discern only two grounds of disability discrimination from
18 the SAC and Plaintiff’s opposition brief: (1) that Plaintiff was not allowed to qualify to carry
19 an ATF-issued firearm using the FATS computerized simulator; and (2) that Plaintiff was
20 offered the IPS position in Washington, D.C. rather than being permitted to remain a Special
21 Agent. Neither of these claims survive summary judgment because Plaintiff was not a
22 “qualified individual” as a matter of law. Thus, Plaintiff cannot meet his prima facie burden
23 of producing evidence that demonstrates a genuine issue of material fact regarding whether
24 he was an otherwise qualified individual with a disability who was discriminated against due
25 to his disability in violation of the Rehabilitation Act. *Mustafa v. Clark Cnty. Sch. Dist.*, 157
26 F.3d 1169, 1175-76 (9th Cir. 1998).

27 To state a prima facie case under the Rehabilitation Act, a plaintiff must demonstrate
28 that (1) he is a person with a disability; (2) who is otherwise qualified for employment; and

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1 (3) suffered discrimination because of his disability. *Walton v. U.S. Marshals Serv.*, 492
 2 F.3d 998, 1005 (9th Cir. 2007).

3 The first element of Plaintiff's prima facie case – whether Plaintiff is “disabled” –
 4 requires an analysis of the relevant ADA definitions of disability.⁷ Neither Plaintiff nor
 5 Defendant briefed the issue of whether Plaintiff's elbow injury was, within the meaning of
 6 the ADA: (A) a physical impairment that substantially limits one or more of the major life
 7 activities of such individual; (B) whether there was a record of such an impairment, or (C)
 8 whether he was regarded as having such an impairment. *Walton*, 492 F.3d at 1005. Under
 9 the more rigorous pre-ADAAA standard applicable in 2006, “a plaintiff alleging substantial
 10 limitation in the major life activity of working ‘must present specific evidence about relevant
 11 labor markets to defeat summary judgment’ and ‘identify what requirements posed by the
 12 class of . . . jobs . . . were problematic in light of the limitations imposed on [him].’” *Id.* at
 13 1009 (ellipses in original) (citing *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789,
 14 795-96 (9th Cir. 2001) *opinion clarified*, 292 F.3d 1045 (9th Cir. 2002)).⁸ Prior to oral
 15 argument, the Court issued questions to the parties to clarify whether Plaintiff, in fact, was
 16 disabled under this definition. While there is evidence in the record that Plaintiff's elbow
 17 injury prevented him from continuing to work as a Special Agent and carry a firearm,

19 ⁷The standards used to determine whether an act of discrimination violated the
 Rehabilitation Act are the same standards applied under the Americans with Disabilities Act
 20 (“ADA”). *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004),
 (citing 29 U.S.C. § 794(d) and 29 C.F.R. § 1614.203(b)). Congress amended the ADA's
 21 definition of disability with the ADA Amendments Act of 2008, Pub. L. No. 110–325, 122
 Stat. 3553 (“ADAAA”). The ADAAA definition of disability does not apply retroactively to
 22 conduct prior to January 1, 2009. *Becerril v. Pima Cnty. Assessor's Office*, 587 F.3d 1162,
 1164 (9th Cir. 2009). Because the allegedly discriminatory actions related to FATS
 23 qualification and the IPS position occurred prior to January 1, 2009, the pre-2009 ADA
 provisions and authorities interpreting those provisions apply.

24 ⁸The Court notes that *Thornton*'s reasoning relies on *Sutton v. United Air Lines, Inc.*,
 527 U.S. 471 (1999), and that “[o]ne of the main purposes of the ADAAA was to repudiate
 the Supreme Court's narrowing interpretations of the term ‘disability’ in *Sutton*” *Curry*
 25 *v. Tilton*, No. C-07-0775 EMC PR, 2012 WL 967062, at *9-10 (N.D. Cal. Mar. 21, 2012).
 However, because the conduct at issue here occurred in 2006, the Court applies the law as it
 26 existed when Defendant made the challenged decisions. *Becerril*, 587 F.3d at 1164; *Curry*,
 27 2012 WL 967062, at *10 (same).

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1 Declaration of Wanda Gill (“Gill Decl.”), Exs. B-F, “the inability to perform a single,
2 particular job does not constitute a substantial limitation in the major life activity of
3 working.” *Coons*, 383 F.3d at 885 n. 1 (citing *Deppe v. United Airlines*, 217 F.3d 1262, 1265
4 (9th Cir. 2000)). *Compare with* Opp’n at 22 n. 7 (concluding without analysis or citation to
5 evidence that “Plaintiff’s elbow injury prevented him from the major life activity of
6 working”). There is no evidence in the record that Plaintiff’s elbow injury was a physical
7 impairment that substantially limited a major life activity, such as work, nor is there evidence
8 of a record of such an impairment, or that he was regarded as having an impairment that
9 substantially limited a major life activity as opposed to one that merely prevented him from
10 working as a Special Agent. To the extent he was merely regarded as having such a physical
11 impairment, there is no duty to accommodate an employee in an “as regarded” case if the
12 individual is not actually disabled. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1233 (9th
13 Cir. 2003). However, the Court does not rely on this issue because the parties did not brief it.
14 Rather, the Court finds that Plaintiff cannot establish his *prima facie* case because he was not
15 a “qualified individual.”

16 A “qualified individual” under the Rehabilitation Act is an individual with a disability
17 “who, with or without reasonable accommodation, can perform the essential functions of
18 [the] position.” *Mustafa*, 157 F.3d at 1175 (citing 29 C.F.R. § 1630.2(m) (internal quotation
19 marks omitted)). “Essential functions are the fundamental duties of the relevant position.”
20 *Id.* (citing 29 C.F.R. § 1630.2(n)(1)).

21 Defendant argues that Plaintiff was not a qualified individual as a matter of law
22 because in June 2006 his doctors had opined that he had a permanent elbow injury that
23 prevented him working as a Special Agent, including express findings that he could not lift a
24 firearm. Mot. at 17. Defendant argues that because the ability to carry and use a firearm is
25 an essential function of the ATF Special Agent position, and because Plaintiff could not have
26 performed this function, he was not a qualified individual under the Rehabilitation Act. *Id.*
27 Plaintiff argues that carrying a firearm is not an essential function of the ATF Special Agent
28

¹ position, but rather “[i]t is an essential function of the job to *qualify to carry* a firearm.”
² Opp’n at 17 (emphasis in original).

The Court finds that the ability to carry and use a firearm is an essential function of the ATF Special Agent position. ATF Special Agents are classified by the U.S. Office of Personnel Management (“OPM”) as a Criminal Investigation Series 1811 position. The OPM individual occupational and medical requirements of the 1811 series state that the duties of these positions include “moderate to arduous physical exertion” involving use of firearms, manual dexterity with “comparatively free motion of” the elbow, and that any physical condition that would cause the applicant “to be a hazard to himself/herself, or others is disqualifying.”⁹ The ATF Use of Force and Weapons Policy, ATF O 3010.1 (“Weapons Policy”) further states that Special Agents are authorized “to bear firearms in furtherance of official law enforcement operations,” are expected to be “available for duty 24 hours a day, 7 days a week in a standby or on-call status,” and are required “to be armed at all times and expected to protect themselves and the public” by using firearms pursuant to the Policy. Weapons Policy ¶ 31(b) (Declaration of Mark Conrad (“Conrad Decl.”), Ex. G). The finding that ability to carry and use a firearm is an essential function of similar federal law enforcement positions is in accord with other courts that have examined the issue. *See, e.g.*, *Puletasi v. Wills*, 290 F. App’x 14, 18 (9th Cir. 2008) (finding ICE criminal investigator not qualified for position where due to injury he could not perform essential functions of job including handling a firearm); *Kaplan*, 323 F.3d at 1230–31; *Carroll v. Holder*, No. CIV. 09-3093-CL, 2011 WL 7091804, at *28 (D. Or. Sept. 30, 2011) *report and recommendation adopted* No. CIV. 09-3093-CL, 2012 WL 214599 (D. Or. Jan. 24, 2012) (finding that “the ability to carry and use a firearm is an essential function” of the 1811 series position of FBI Special Agent, and therefore that plaintiff was not a qualified individual as defined by the

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1 Rehabilitation Act because no reasonable accommodation would have allowed her to perform
2 this essential function of the position).

3 There is no genuine dispute of material fact as to this finding. Plaintiff cites to the
4 same Weapons Policy to argue that it permits a Special Agent who is pregnant or who has a
5 temporary or short term medical condition to qualify for firearms proficiency using
6 alternative testing methods. Weapons Policy ¶ 67(d), Conrad Decl., Ex. G. However, the
7 availability of alternative qualification procedures assumes that the Special Agent can
8 nonetheless perform the essential functions of the job. The same Weapons Policy cited by
9 Plaintiff also clearly provides that leave status does not suspend a Special Agent's authority
10 to carry firearms and that Special Agents "are authorized to be armed at all times and
11 expected to protect themselves and the public . . ." *Id.* ¶ 31(b). During oral argument,
12 Plaintiff presented to the Court descriptions for the positions of GS-1811-13 Criminal
13 Investigator and Criminal Investigator (Senior Operations Officer) positions.¹⁰ Each states
14 that the applicant "[m]ust display required proficiency with firearms." Neither of these
15 documents, however, raises a genuine issue of material fact as to whether ability to carry and
16 use a firearm is an essential function of the Special Agent position, and in fact, the
17 documents actually reinforce the conclusion that it is an essential function. The Court
18 therefore finds that ability to carry a firearm is an essential function of the ATF Special
19 Agent position.

20 Plaintiff's doctors opined that he could not carry a firearm or perform the duties of a
21 Special Agent due to his elbow injury. From June to September, 2006, Plaintiff submitted
22 several doctors' notes to the Office of Workers Compensation Programs, an organization
23 within the Department of Labor, that administers the claims of federal employees who seek
24 benefits in connection with work-related injuries. Gill Decl. ¶¶ 1-3. In a June 27, 2006 letter
25

26 ¹⁰Neither of these documents were authenticated, but bear the bates labels
27 USA_002910 and USA_000842, respectively. The Court therefore may consider these
28 documents. See *Orr v. Bank of Am.*, 285 F.3d 764, 777 n. 20 (9th Cir. 2002) (noting that
"documents produced by a party in discovery were deemed authentic when offered by the
party-opponent" in *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889
n. 12 (9th Cir. 1996)).

1 to the Department of Labor, Plaintiff's orthopedic surgeon Dr. Robert Caton, M.D. wrote the
2 following:

This letter is in regard to Vincent Cefalu. He is seen in follow-up of a recent surgery done on February 10, 2006 . . . At the present time I am going to make him permanent and stationary but he is going to have permanent job restrictions . . . 1. No repetitive motion of his right elbow . . . In reference to his specific job duties, he does not appear to be able to work as a special agent any more at this time, due to the fact that he cannot be lifting a gun as it is felt to be not medically reasonable for him as he could cause damage to himself or fellow employees. He is unable to hold a gun in a prolonged position with the wrist in extension.

9 Gill Decl., Ex. A at 1-2. Plaintiff’s physician explicitly stated that Plaintiff’s elbow injury
10 was permanent, that he could not lift a gun, and he opined that to lift a gun could cause
11 damage to himself or others, and that he could no longer work as a Special Agent. While
12 Plaintiff argues that his disability “was not permanent,” Opp’n at 18, Plaintiff cites no
13 evidence in support of this assertion and directs the Court to no evidence that might allow a
14 reasonable fact-finder to infer that anyone at ATF understood Plaintiff’s elbow injury to be
15 only temporary at the time the challenged conduct occurred.¹¹ The physical limitation and
16 proscriptions identified by Plaintiff’s physician overlap with the OPM occupational and
17 medical requirements of the Series 1811 criminal investigator position (lifting and carrying a
18 firearm, manual dexterity of the elbow, posing potential hazard to himself or others).
19 Therefore, Plaintiff could not have performed the essential functions of the ATF Special
20 Agent position “with or without reasonable accommodation.” *Mustafa*, 157 F.3d at 1175.
21 Plaintiff thus was not a “qualified individual” under the Rehabilitation Act.

22 Because Plaintiff cannot establish a prima facie case that he was an otherwise
23 qualified individual with a disability who was discriminated against due to his disability, his
24 Rehabilitation Act claim fails as a matter of law. *Coons*, 383 F.3d at 886. Accordingly,

25 ¹¹Plaintiff presented a physicians note from Dr. Caton, dated July 3, 2006, opining that
26 live-fire firearms qualifications would have a negative or detrimental effect on Plaintiff's
27 "current medical condition" and that computer simulated video firearms training would not.
28 Pl.'s Ex. 4. This evidence, however, does create a genuine issue of material fact as to
whether Plaintiff's physicians had opined that he could not lift a firearm, that to do so could
endanger himself or others, and that he could not perform the duties of an ATF Special
Agent.

1 Plaintiff's claims that ATF refused to allow him to qualify using the FATS computer
2 simulator and that ATF failed to reasonably accommodate Plaintiff when it offered him the
3 IPS position in Washington, D.C. are not actionable. The Court GRANTS Defendant's
4 motion for summary judgment as to Plaintiff's Rehabilitation Act cause of action.

5

6 **III. Retaliation Under the ADEA and Rehabilitation Act**

7 The ADEA and the Rehabilitation Act prohibit federal employers from retaliating
8 against employees who challenge discrimination based on age or disability, respectively.
9 *Gomez-Perez v. Potter*, 553 U.S. 474, 477 (2008) (citing 29 U.S.C. § 633a(a) (ADEA); 29
10 U.S.C. § 794(d) (Rehabilitation Act incorporating ADA's prohibition against retaliation, 42
11 U.S.C. § 12203(a)). Even when an employee is not disabled under the ADEA or the
12 Rehabilitation Act, the court must still address his retaliation claim. *Coons*, 383 F.3d at 887
13 (9th Cir. 2004) (citing *Heisler v. Metro. Council*, 339 F.3d 622, 630 n.5 (8th Cir. 2003) ("the
14 ADA prohibits an employer from retaliating against an employee who seeks an
15 accommodation in good faith"). In *Coons*, the Ninth Circuit articulated the analytical
16 framework as follows:

17 A prima facie case of retaliation requires a plaintiff to show: (1)
18 involvement in a protected activity, (2) an adverse employment action
19 and (3) a causal link between the two. The plaintiff must present
evidence adequate to create an inference that an employment decision
was based on an illegal discriminatory criterion. In other words, [the
Plaintiff] must establish a link between his [protected activity and the
adverse employment action]. Once the plaintiff establishes a prima
facie case, the employer has the burden to present legitimate reasons for
the adverse employment action. If the employer carries this burden,
and plaintiff demonstrates a genuine issue of material fact as to whether
the reason advanced by the employer was a pretext, then the retaliation
case proceeds beyond the summary judgment stage.

23
24 383 F.3d at 887 (internal quotations, citations, and emphases omitted). "An adverse employment
25 action is any adverse treatment that is based on a retaliatory motive and is reasonably likely to
26 deter the charging party or others from engaging in protected activity." *Poland v. Chertoff*, 494
27 F.3d 1174, 1180 (9th Cir. 2007) (quotation marks omitted) (citing *Ray v. Henderson*, 217 F.3d
28 1234, 1242-43 (9th Cir. 2000)). Focusing on the "materiality of the challenged action and the

1 perspective of a reasonable person in the plaintiff's position . . . screen[s] out trivial conduct
2 while effectively capturing those acts that are likely to dissuade employees from complaining
3 or assisting in complaints about discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*,
4 548 U.S. 53, 69-70 (2006). Thus, a challenged action is materially adverse when it "might have
5 dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68.
6 An adverse employment action must be sufficiently "final or lasting" to create a *prima facie* case.
7 *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) (holding negative performance
8 evaluation not "sufficiently final to constitute an adverse employment action" because plaintiff
9 appealed evaluation but abandoned her job and appeal could theoretically have changed the
10 evaluation).

11 Although Plaintiff has not specifically enumerated in his Second Amended Complaint the
12 precise legal theory associated with each complained-of incident, the remainder of Plaintiff's
13 claims generally sound under a retaliation theory, and the Court analyses each accordingly.

14 **1. Retaliation for Claims Initiated Prior To Engaging In Protected Activity**

15 To the extent Plaintiff's retaliation claims are based on events that occurred prior to
16 Plaintiff's initiation of contact with EEO counselor Larry Sovinsky ("Sovinsky"), these claims
17 fail as a matter of law. *Coons*, 383 F.3d at 887. The evidence indicates Plaintiff first engaged
18 in protected activity as early as January 13, 2006, when he contacted Sovinsky to set up an
19 appointment to meet for his initial EEO interview on January 17, 2006. Bouman Decl., Ex. 19
20 at 16. Filing of EEO complaints is a protected activity. *Poland*, 494 F.3d at 1180. "[C]ontact
21 with the EEO counselor [is] itself 'protected activity.'" *Hashimoto v. Dalton*, 118 F.3d 671, 680
22 (9th Cir. 1997). Plaintiff, however, presents no affirmative evidence that he otherwise engaged
23 in protected activity prior to January 13, 2006. Accordingly, summary judgment is GRANTED
24 as to all retaliation claims occurring temporally prior to this protected activity, including any
25 claims arising out of the issuance of a government-owned vehicle (SAC ¶¶ 29-31), "old-guy"
26 remarks (SAC ¶¶ 27-28, 30), the American Graffiti Investigation (SAC ¶¶ 33-41), removal from
27 the Robert Holloway Investigation (SAC ¶¶ 42-53), and SAC Vido's written denial of Plaintiff's
28

1 request to speak directly regarding the Holloway investigation, which was dated no later than
2 January 12, 2006. Bouman Decl., Ex. 19 at 18, ¶ 11.

3 **2. Referral to ATF's Employee Assistance Program**

4 On February 7, 2006, RAC Downs gave Plaintiff a memo referring him to ATF's
5 Employee Assistance Program for anger management and other counseling services. Downs
6 Decl. ¶ 42. The confidential EAP referral memo was not an adverse employment action because
7 Plaintiff voluntarily referred himself to the EAP prior to January 31, 2006. Pl.'s Resp. To
8 Def.'s Reqs. For Admiss. at 7 (Pl.'s admission), Conrad Decl., Ex. E.; *see Semsroth v. City of*
9 *Wichita*, 555 F.3d 1182, 1187 (10th Cir. 2009) (no material adversity when employee voluntarily
10 submitted to fitness-for-duty exam). Plaintiff did not address or present any evidence related to
11 this claim. Summary judgment for this claim is GRANTED.

12 **3. January 2006 Transfer to Sacramento Field Office**

13 Plaintiff contends that his January 2006 transfer to the Sacramento Field Office was
14 retaliation for initiating his first EEO Complaint. Opp'n at 15. Defendant maintains the decision
15 to transfer Plaintiff was made prior to when any of the "relevant officials" knew Plaintiff had
16 engaged in protected activity. Mot. at 15. Plaintiff engaged in protected activity when he
17 contacted Sovinsky on January 13, 2006 and met with him on January 17, 2006. *Hashimoto*, 118
18 F.3d at 680. The transfer to the Sacramento Field Office is "cognizable as an adverse
19 employment action if [it would be] reasonably likely to deter employees from engaging in
20 protected activity." *Ray*, 217 F.3d at 1243. Plaintiff contends the transfer would have resulted
21 in increased commute distance and a decrease in pay due to lower cost of living adjustments.
22 Opp'n at 15. ASAC Gleysteen testified that permanent reassignment to the Sacramento Office
23 would have rendered Plaintiff ineligible for a cost of living adjustment available at the San
24 Francisco Field Division – although ASAC Gleysteen testified he was not aware of it at the time
25 of the transfer – and that Permanent Change of Station ("PCS") funds would not have been
26 available to assist in Plaintiff's transfer. May 10, 2007 Gleysteen Dep. at 73:22-74:20; 78:19-
27 79:18 (Bouman Decl., Ex. 26). A transfer that is implemented and that would ultimately result
28 in increased commute time or a decrease in compensation might reasonably be likely to deter an

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1 employee from engaging in protected activity and is therefore an adverse employment action.
 2 *Ray*, 217 F.3d at 1243; *White*, 548 U.S. at 68. Defendant argues that the transfer cannot
 3 constitute adverse employment action since Plaintiff “showed up one day” and never reported
 4 for duty there again due to medical leave. Reply at 13. RAC Downs testified that Plaintiff “was
 5 there for four days,” then went on leave, and then had surgery. May 9, 2007 Downs Dep. at
 6 72:11-23 (Bouman Decl., Ex. 25). Unlike a transfer that is only contemplated or never actually
 7 implemented, which would not be reasonably likely to deter an employee from engaging in
 8 protected activity, the January 2006 transfer was implemented, and even though Plaintiff went
 9 out on leave and the transfer was later reversed, it was the type of adverse employment action
 10 that could deter a reasonable employee from engaging in protected activity.

11 Defendant argues Plaintiff cannot meet his *prima facie* burden because he cannot show
 12 a causal link between Plaintiff’s protected activity on January 17, 2006 and SAC Vido’s and
 13 ASAC Gleysteen’s decision to transfer Plaintiff on January 19, 2006. Defendant presented
 14 evidence that neither knew that Plaintiff engaged in protected activity at the time the decision
 15 was made. Gleysteen Decl. ¶ 31-32; Declaration of Paul Vido ¶ 19, Bouman Decl., Ex. 30.
 16 “Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged
 17 in the protected activity.” *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).
 18 Nonetheless, there is sufficient evidence in the record from which a reasonable fact-finder could
 19 conclude that ASAC Gleysteen or SAC Vido had knowledge of the protected activity. Plaintiff
 20 testified that he told RAC Downs he was on his way to file an EEO complaint during the
 21 January 17, 2006 meeting. Cefalu Dep., at 12:3-23 (Pl.’s Ex. 1). RAC Downs testified that he
 22 did not recall Plaintiff telling him he was on his way to make the EEO complaint. Bouman
 23 Decl., Ex. 25 at 66:20-23. After this meeting, RAC Downs testified that he contacted ASAC
 24 Gleysteen and “let him know what had happened.” Downs. Dep. at 73:14-22; 67:20-23
 25 (Bouman Decl., Ex. 25). ASAC Gleysteen testified that he spoke with RAC Downs about the
 26 Sacramento transfer on January 18, 2006.¹² On January 19, 2006, ASAC Gleysteen decided to

27 ¹²“Q: Before making the decision to transfer Mr. Cefalu, did you have discussions
 28 about Mr. Cefalu’s transfer with Mr. Downs?

A: Well, let’s – what started the situation was an incident on January 17th or

1 transfer Plaintiff to the Sacramento Field Office, effective January 22, 2006. Gleysteen Decl.
 2 ¶ 31. Viewing the evidence in the light most favorable to Plaintiff, Plaintiff told RAC Downs
 3 about his intention to engage in protected activity, RAC Downs spoke with ASAC Gleysteen
 4 either on the same day as his meeting with Plaintiff or the day after, and one or two days later
 5 ASAC Gleysteen made the decision to transfer Plaintiff to Sacramento. “[P]roximity in time
 6 between the protected action and the allegedly retaliatory employment decision [is one way] a
 7 jury logically could infer” that Plaintiff suffered an adverse employment action in retaliation.
 8 See *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751–52 (9th Cir. 2001) (internal
 9 quotation marks omitted) (citing *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir.
 10 1988)). Thus, there is evidence in the record that establishes a prima facie case as to retaliation
 11 based on the Sacramento Field Office transfer.

12 The burden then shifts to Defendant to articulate legitimate, non-discriminatory reasons
 13 for the Sacramento transfer. ASAC Gleysteen averred that the decision was made because of
 14 staffing needs due to the prior departure of another agent from Sacramento and so that Plaintiff
 15 could be supervised directly by RAC Downs. Gleysteen Decl. ¶ 31. These reasons are
 16 legitimate, non-discriminatory reasons for the decision to transfer Plaintiff, and accordingly, the
 17 burden shifts to Plaintiff to present evidence that demonstrates a genuine issue of material fact
 18 exists as to whether these reasons are pretext. “In some cases, temporal proximity can by itself
 19 constitute sufficient circumstantial evidence of retaliation for purposes of both the prima facie
 20 case *and the showing of pretext.*” *Dawson v. Entek Int’l*, 630 F.3d 928, 937 (9th Cir. 2011)
 21 (emphasis added) (citing *Bell v. Clackamas Cnty.*, 341 F.3d 858, 865-66 (9th Cir. 2003) and
 22 *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731-32 (9th Cir. 1986)). But these issues about
 23 who knew what and when are factual. There is a genuine issue of material fact as to whether
 24 Plaintiff’s January, 2006 transfer to Sacramento was retaliation for engaging in protected activity
 25 several days before. “[E]vidence based on timing can be sufficient to let the issue go to the jury,
 26 even in the face of alternative reasons proffered by the defendant.” *Passantino v. Johnson &*

27 _____
 28 thereabouts, it probably would have been on maybe the 18th, I probably told him what I was
 doing and what we were doing.” Gleysteen Dep. at 67:18-24 (Bouman Decl., Ex. 26).

1 Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th Cir. 2000). Accordingly, summary
 2 judgment as to this retaliation claim is DENIED.

3 **4. Transfer to the Houston Detail**

4 Plaintiff claims ATF ordered Plaintiff to a six-month detail in Houston, Texas in February
 5 2006 as retaliation for participating in the EEO process. SAC ¶¶ 87-88. Plaintiff, however,
 6 never went to Houston because he underwent elbow surgery in February, 2006, and remained
 7 on sick leave for several months afterwards. September 20, 2012 Cefalu Dep. at 513:15-25
 8 (admitting Plaintiff never went to the Houston detail) (Conrad Decl., Ex. A); Downs Decl. ¶¶
 9 43-44. While transfer of job duties may constitute an adverse employment decision, *Yartzoff v.*
 10 *Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987), Plaintiff never reported for duty in Houston
 11 because he was out on medical leave. In contrast to the Sacramento transfer, for which Plaintiff
 12 appeared for work for several days, Plaintiff's transfer to Houston was never "implemented, and
 13 therefore [never] became sufficiently 'final or lasting' to support a prima facie claim."
 14 *Marrazzo v. Leavitt*, 719 F. Supp. 2d 1297, 1308 (D. Or. 2010) (citing *Brooks*, 229 F.3d at
 15 930).¹³ An unimplemented transfer would not be reasonably likely to deter an employee from
 16 engaging in protected activity. *Ray*, 217 F.3d at 1243. Because Plaintiff failed to present
 17 evidence establishing a prima facie retaliation claim, summary judgment arising out of a claim
 18 relating to the Houston transfer is GRANTED.

19 **5. Proposed Three Day Suspension**

20 In February, 2006, RAC Downs met with Plaintiff, provided him with a Notice of
 21 Proposal to Suspend for Three Days, and informed Plaintiff that ATF intended to suspend him

22 ¹³Plaintiff correctly observes that *Brooks*, decided in 2000, pre-dates *White*, decided in
 23 2006, Opp'n at 16, and that *White* announced the rule that a challenged action is materially
 24 adverse when it "might have dissuaded a reasonable worker from making or supporting a
 25 charge of discrimination." *White*, 548 U.S. at 68. *Brooks* however, post-dates and cites to
 26 *Ray v. Henderson*, which announced the rule in this Circuit that an adverse employment
 27 action is cognizable "if it is reasonably likely to deter employees from engaging in protected
 28 activity." *Brooks*, 229 F.3d at 929 (citing *Ray*, 217 F.3d at 1243). *White* and *Ray* are thus
 substantially similar in their focus on objective deterrent effect. Plaintiff cites no authority
 calling into question the holding of *Brooks*. *White* and *Ray*'s rules are not inconsistent with
Brooks' requirement that the adverse employment action have some degree of finality.
 Indeed, a challenged adverse employment action would be most reasonably likely to deter an
 employee from engaging in protected activity when the challenged action is sufficiently final
 or lasting.

1 as discipline for prior misconduct and insubordination. Downs Decl. ¶ 43 & Ex. E. ASAC
2 Gleysten decided that the suspension was to be held in abeyance pending Plaintiff's detail to
3 Houston. Gleysten Decl. ¶ 38. Plaintiff went out for elbow surgery, remained on sick leave, and
4 never reported to Houston. The proposed suspension was never issued, and ASAC Gleysteen
5 rescinded it when Plaintiff returned to duty as a Special Agent in April 2007. Gleysteen Decl.
6 ¶ 53; Cefalu Dep. at 119:15-22 (Bouman Decl., Ex. 24). A suspension that is merely proposed
7 but never actually issued or served does not rise to the level of a sufficiently final or lasting
8 adverse action necessary to support a prima facie claim. *Brooks*, 229 F.3d at 930; *Baloch v.*
9 *Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (finding proposed decision on possible 30-
10 day suspension not materially adverse because "courts have been unwilling to find adverse
11 actions where the suspension is not actually served"); *Whittaker v. N. Ill. University*, 424 F.3d
12 640, 647 (7th Cir. 2005) ("[A] suspension without pay that is never served does not constitute
13 an adverse employment action"). An unimplemented suspension is not reasonably likely to
14 deter an employee from engaging in protected activity. *Ray*, 217 F.3d at 1243. Because Plaintiff
15 failed to present evidence establishing a prima facie claim for this issue, summary judgment is
16 GRANTED as to the three-day proposed suspension retaliation claim.

17 **6. Denial of FATS Qualification**

18 To the extent Plaintiff construes ATF's refusal to allow Plaintiff to qualify using
19 FATS computer simulation as a retaliation claim, such a claim fails as a matter of law.
20 Plaintiff claims he amended his EEOC complaint on March 23, 2006 and that ATF's denial
21 of FATS qualification occurred within three months of Plaintiff's amendment. Opp'n at 19.
22 Plaintiff presented no evidence that disputes that his own doctors opined that he was unable
23 to lift a gun, was permanently disabled, and was unable to serve as an ATF Special Agent.
24 Gill Decl., Ex. A. Plaintiff presented no evidence that denial of the FATS qualification
25 caused Plaintiff to lose his Special Agent status, but rather, the evidence indicates that he lost
26 his Special Agent status because of his underlying medical condition which prevented him
27 from performing the essential function of the job. *See infra* at Part II. Denial of the ability to
28 qualify to carry a firearm for use in a job for which an employee is no longer medically able

1 to perform cannot reasonably be categorized as an adverse action because it is, at most, a
2 non-actionable “trivial harm.” *White*, 548 U.S. at 68. Because denial of the opportunity to
3 participate in FATS qualification when an employee is no longer able to perform the job
4 would not reasonably deter an employee from engaging in protected activity, *Ray*, 217 F.3d
5 at 1243, Plaintiff cannot establish a *prima facie* retaliation claim for this issue. Summary
6 judgment for this retaliation claim is GRANTED.

7 **7. Intelligence Program Specialist Position**

8 Plaintiff contends that he amended his EEOC complaint on August 16, 2006, and that
9 in September 2006, he was faced with a choice between termination and accepting the non-
10 Special Agent IPS position in Washington, D.C. He argues that ATF’s offer of this position
11 “constituted a materially adverse action because Plaintiff and his family would have to move
12 across the country . . . [and] Plaintiff would not be able to enjoy any of the benefits of being
13 an ATF special agent.” Opp’n at 17. The undisputed evidence shows that Plaintiff never
14 physically relocated to Washington, D.C., briefly reported to the Dublin Field Office during
15 the transition period to Washington, D.C., but instead chose to have surgery again and went
16 on medical leave. December 11, 2012 Cefalu Dep. at 525:9-527:12 (Conrad Decl., Ex. A);
17 Declaration of Stephen K. Martin (“Martin Decl.”) ¶ 6. Following a successful surgery,
18 Plaintiff returned to duty as a Special Agent in April 2007. Cefalu Dep. at 532:5-533:16 (Conrad Decl., Ex. A). Offering the IPS position as an accommodation to an employee who
19 can no longer perform work as a Special Agent does not constitute an adverse employment
20 action because it is not the type of action that “might have dissuaded a reasonable [person]
21 from making or supporting a charge of discrimination.” *White*, 548 U.S. at 68; *Ray*, 217 F.3d
22 at 1243. Moreover, Plaintiff never moved to Washington, D.C. to fulfill the IPS position and
23 thus it was not a lasting or final adverse employment action. *Brooks*, 229 F.3d at 930. Even
24 if it were, Plaintiff presented no evidence establishing a causal link between engaging in a
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1 protected activity and the offer of the position.¹⁴ Summary judgment is GRANTED as to this
 2 claim.

3 **8. Damage to Plaintiff's ATF Badges**

4 After Plaintiff initially refused to accept the IPS job transfer and was given a notice of
 5 termination, RAC Downs collected Plaintiff's ATF badges and credentials on October 31,
 6 2006. May 8, 2007 Cefalu Dep. at 205:17-206:10 (Bouman Decl., Ex. 24); September 20,
 7 2012 Cefalu Dep. at 537:1-15 (Conrad Decl., Ex. A). Plaintiff's badges were sent to ATF
 8 headquarters in Washington, D.C. Cefalu Dep. at 206:11-15, 211:10-13 (Bouman Decl., Ex.
 9 24). When Plaintiff returned as a Special Agent in March-April 2007, he was notified that
 10 his badges had been damaged when they arrived at headquarters. *Id.* at 206:16-208:24. ATF
 11 issued Plaintiff temporary badges and subsequently issued him replacement badges with the
 12 original badge numbers in May 2007. Gleysteen Decl. ¶ 53. Plaintiff alleges his ATF
 13 badges were "defaced intentionally" while in the custody of his SFFD supervisors. SAC ¶
 14 120. Contrary to Plaintiff's argument, even if the badges were intentionally defaced, such
 15 defacement would not be *direct* evidence of retaliation, "which, if believed, proves the fact
 16 [of discriminatory or retaliatory animus] without inference or presumption." *Coghlan*, 413
 17 F.3d at 1094-95.¹⁵ Concluding that the badges were damaged in retaliation for engaging in
 18 protected activity requires an inferential leap, and requires Plaintiff to nonetheless present
 19 evidence establishing a prima facie case of retaliation. Fatal to this claim is defacement of
 20 government-issued identification and badges, even if true, would not rise to the level of an
 21

22 ¹⁴Plaintiff may contend that a retaliation claim exists for ATF's issuance of away
 23 without leave ("AWOL") status for failure to report to duty as required on November 14,
 24 2006, Opp'n at 10, 23-24; Bennett Decl., ¶¶ 3-4 & Ex. A at ¶ 14. Plaintiff presented no
 25 evidence that ATF's articulation of legitimate, non-discriminatory reasons for placing
 26 Plaintiff on AWOL status were pretext. Summary judgment is therefore GRANTED for this
 27 claim as well.

28 ¹⁵Plaintiff's citation to *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012)
 29 is inapposite because that case involved an inference of discriminatory animus in a hostile
 30 work environment claim as opposed to retaliation claims. Plaintiff, here, presented no direct
 31 evidence of discriminatory animus. Even if Plaintiff's badges were scratched, that action is
 32 distinguishable from the repeated instances of race-based harassment in *Jones* because
 33 Plaintiff's badges were promptly replaced and damage to government-issued badges does not
 34 rise to the level of an adverse employment action.

1 adverse employment action. The test for whether a challenged action rises to the level of an
2 adverse employment action is an objective one. *White*, 548 U.S. at 68. Unlike adverse
3 employment actions such as a termination, negative reference, negative performance review,
4 or refusal to consider for promotion, *Brooks*, 229 F.3d at 929 n. 11 (collecting cases),
5 defacement of an employee's government-issued badges and credentials, which were
6 promptly replaced, is not sufficiently final or lasting and would not reasonably deter an
7 employee from engaging in protected activity. *Brooks*, 229 F.3d at 930; *Ray*, 217 F.3d at
8 1243. Accordingly, summary judgment as to the retaliation claim involving the badges is
9 therefore GRANTED.

10 **9. Second Transfer to Sacramento**

11 On January 17, 2007, Plaintiff sent an email to Wanda Gill, a human resources
12 specialist with the Office of Workers Compensation Programs, copying ASAC Gleysteen and
13 SAC Martin, notifying ATF that his treating physician had cleared him to return to full duties
14 as a Special Agent, and requested to be stationed in Stockton, California. Pl.'s Ex. 8. Later
15 that day, SAC Martin wrote to ASAC Gleysteen stating "Let's confirm with Travel that we
16 can place Vince in Sacto with a sup whom he does not have an EEO against – w/o a PCS."
17 Pl.'s Ex. 9.¹⁶ Plaintiff contends this is direct evidence that "Plaintiff's EEOC activity
18 unlawfully was considered as a factor in the ATF's decision making process." Opp'n at 13.
19 SAC Martin's statement is not the type of direct evidence "which, if believed, proves the fact
20 [of discriminatory or retaliatory animus] without inference or presumption," nor is it direct
21 evidence that "consists of *clearly* sexist, racist, or similarly discriminatory statements or
22 actions by the employer." *Coghlan*, 413 F.3d at 1095 (internal citation and quotation
23 omitted) (emphasis added). Rather, it is circumstantial evidence which requires inference
24 from a fact-finder. Plaintiff must still present evidence that would establish a *prima facie*
25 retaliation case.

26

27

28 ¹⁶This email is admissible as a statement offered against ATF as made by ATF's
employee, SAC Martin. FRE 801(d)(2)(D).

1 Plaintiff suggests this “second” transfer occurred in January 2007, two months after
2 his November 29, 2006 EEO complaint amendment. Opp’n at 18. While amending an EEO
3 complaint is a protected activity, Plaintiff fails to establish that this second transfer is an
4 adverse employment action because the contemplated transfer was never effectuated. See
5 Mar. 7, 2008 Declaration of Stephen Martin, Martin Decl., Ex. C ¶ 2 (averring that “I
6 considered transferring [Plaintiff] to the Sacramento Field Office; however, after speaking
7 with [Plaintiff] who advised such a transfer would mean a deduction in pay as the
8 Sacramento Field Office has a lower pay scale than the Stockton and Dublin offices, I
9 decided not to transfer [Plaintiff] to Sacramento”). Plaintiff cited no evidence creating a
10 genuine dispute of material fact that he served in Sacramento pursuant to this transfer or
11 otherwise lost benefits because of the contemplated transfer. Like Plaintiff’s never-
12 effectuated transfer to Houston, Plaintiff’s second transfer to Sacramento is not an adverse
13 employment action as a matter of law. First, a contemplated transfer that is not effectuated
14 because an employer grants an employee’s request not to go cannot be an adverse action
15 because it is not one that would “dissuade[] a reasonable worker from making or supporting
16 a charge of discrimination.” *White*, 548 U.S. at 68. Second, because the transfer was never
17 implemented, it was not “sufficiently final to constitute an adverse action” and therefore
18 support a *prima facie* claim. *Brooks*, 229 F.3d at 930. Summary judgment as to Plaintiff’s
19 retaliation claim arising from the this claim is GRANTED.

20 **10. Senior Operations Officer Assignment**

21 Plaintiff claims retaliation based on his assignment as the Special Operations Officer
22 (“SOO”) in Dublin when he returned to duty in April 2007. SAC. ¶¶ 118-119, 124-129.
23 Plaintiff contends the SOO position is “materially adverse because it is not in the field”
24 because “[w]hen one thinks of an ATF special agent, the first thing that comes to mind is
25 someone conducting undercover investigations, not someone with a full-time desk job.”
26 Opp’n at 18. Plaintiff asserts in his Opposition brief that he was given “very few
27 responsibilities” and “idled” as SOO. Plaintiff does not dispute that the SOO position is held
28 by ATF Special Agents such as Plaintiff. Declaration of Debora Livingston (“Livingston

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1 Decl.”) ¶ 4. Plaintiff instead argues that he was not assigned appropriate job duties and not
2 given training. “[R]eassignment of job duties is not automatically actionable. Whether a
3 particular reassignment is materially adverse depends upon the circumstances of the
4 particular case, and ‘should be judged from the perspective of a reasonable person in the
5 plaintiff’s position, considering ‘all the circumstances.’” *White*, 548 U.S. at 71 (citation
6 omitted). Plaintiff presented no evidence showing that he was given inappropriate job duties
7 or that ATF failed to provide him needed training.

8 Assuming, *arguendo*, that Plaintiff had presented evidence sufficient to establish his
9 *prima facie* case showing that assignment to the SOO position and performing the duties
10 associated with it were adverse employment actions caused by engaging in protected activity,
11 Defendant has presented undisputed evidence that Plaintiff’s assignment as SOO was done in
12 a legitimate, non-discriminatory manner and that Plaintiff was offered training and given
13 assignments. Martin Decl. ¶ 7 (averring that he assigned Plaintiff to the SOO position in the
14 Dublin Field Office because the “Special Agent who had been serving as the Tactical
15 Operations Officer – and had been performing the duties of a Senior Operations Officer . . .
16 had retired”); Livingston Decl. ¶ 4 (Plaintiff’s first-line supervisor averring that “[w]hen I
17 supervised Agent Cefalu, I provided him with work to do” that included maintaining property
18 inventory, maintaining the ATF vehicle fleet, and offered to provide training to Plaintiff on
19 using Microsoft Excel). Defendant has therefore produced evidence to satisfy its burden that
20 the assignment and duties of the SOO position were made in a legitimate, non-discriminatory
21 manner.

22 Plaintiff failed to present any evidence of pretext. Plaintiff cites a July 22, 2010 letter
23 from ATF’s EEO Office noting that the claims Plaintiff “alleged” and which were referred
24 for investigation included allegations that Plaintiff received a directed reassignment to
25 Dublin, California, was not assigned duties appropriate to the Special Agent position, and did
26 not receive training for some new duties (Inventory Audit). Plaintiff’s Ex. 15. A promise
27 from the EEO Office to investigate allegations made by Plaintiff is not specific and
28

1 substantial evidence of pretext. Accordingly, summary judgment is GRANTED as to this
 2 retaliation claim involving the SOO assignment and duties.

3 **11. Use of Government Credit Card**

4 In March 2008, a SFFD financial officer noticed that Plaintiff had used his
 5 government credit card at a resort in Lake Tahoe while he was out of the office on annual
 6 leave and brought it to the attention of Plaintiff's supervisor, Division Operations Officer
 7 Thomas Lyster. Declaration of Thomas Lyster ¶ 11. Lyster sent ATF's Internal Affairs
 8 Division ("IAD") an email relaying the facts as he understood them. *Id.* at ¶¶ 11-12 & Ex. D.
 9 IAD conducted an investigation and no action was taken by ATF against Plaintiff.
 10 Declaration of Daniel Machonis ("Machonis Decl."), Exs. A-C. Plaintiff included
 11 allegations related to this claim in his original Complaint but omitted these claims in the
 12 SAC. Defendant moved for summary judgment on this claim. Plaintiff did not address it in
 13 his opposition and failed to produce any evidence indicating that IAD's investigation
 14 constitutes an adverse employment action, especially where no action was taken against
 15 Plaintiff by ATF. *Cf. Baloch*, 550 F.3d at 1199 (no claim lies where suspension "not actually
 16 served"). To the extent Plaintiff maintains a retaliation claim in this issue, summary
 17 judgment is GRANTED.

18 **12. Plaintiff's Appearance on CNN**

19 In May 2010, Plaintiff appeared in a segment on CNN's Anderson Cooper 360°, in
 20 which he described how he was paid "good money for not a lot of work," and had been
 21 "idled" in his duties in response to whistleblowing activities.¹⁷ Def.'s Req. for Judicial
 22 Notice, Ex. J (video excerpt of May 27, 2010 broadcast). On September 8, 2010, Plaintiff's
 23 supervisor, Division Operations Officer Debora Livingston delivered a memorandum to
 24 Plaintiff outlining the specific work duties that were expected of him. Livingston Decl., ¶ 7
 25 & Ex. B. Plaintiff included allegations related to this claim in his original Complaint but

26 ¹⁷The Court takes judicial notice that Plaintiff appeared on CNN in May 2010 for the
 27 purpose of indicating that statements made by Plaintiff on the program were in the "public
 28 realm at the time, not whether the contents of those [statements] were in fact true." *Von
 Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (citing
Premier Growth Fund v. Alliance Capital Mgmt., 435 F.3d 396, 401 n. 15 (3d Cir. 2006)).

omitted from the SAC mention of the May 2010 CNN appearance or subsequent memorandum outlining specific work duties. *Compare SAC with Docket No. 10 ¶¶ 136-137.* Defendant moves for summary judgment as to this claim on the basis that Plaintiff cannot claim discrimination or retaliation for being given work to do after appearing on television and complaining he had none. Mot. at 22. Plaintiff presented no evidence related to this claim, and instead argues that Plaintiff's whistleblowing activities on CNN are being litigated in another forum and that "the fact that Plaintiff has engaged in whistleblowing activity merely is a consideration at trial for the determination of why the materially adverse actions were taken against Plaintiff." Opp'n at 25. The Court finds that being given a memorandum containing an enumeration of specific job duties is not an adverse employment action when the employee previously stated he lacked work. Plaintiff failed to present any evidence related to retaliation surrounding the May 2010 CNN appearance and thus failed to establish a prima facie retaliation case based on this claim. Summary judgment is GRANTED as to this claim to the extent Plaintiff claims retaliation in the form of the assignment of additional work duties stemming from this incident.¹⁸

13. Plaintiff's Six-Day Suspension

Plaintiff asserts that ATF retaliated against him when he was suspended for six days on July 28, 2011. SAC ¶ 135. Plaintiff notes that he amended his EEOC complaint on January 6, 2011. Opp'n at 20. While amending an EEO complaint is a protected activity, and a served suspension is an adverse employment action, Plaintiff failed to present evidence that establishes a causal link between any of his EEO activity and ATF's decision to suspend him for six days. *Coons*, 383 F.3d at 887.

During the course of furnishing discovery to the Holloway criminal defendants, ATF reviewed Plaintiff's government-issued computer and learned that Plaintiff had used his ATF email account to send and receive allegedly racist, sexually explicit, profane, emails

¹⁸Plaintiff states that "[i]t is wholly inappropriate to mention Plaintiff's whistleblowing activities at the summary judgment posture because Plaintiff does not have to prove but-for causation." Opp'n at 25. The Court notes that it does not consider or express any opinion as to any whistleblowing activities on the part of Plaintiff.

1 purportedly in violation of ATF's computer-use policies. Mot. at 22 (citing Machonis Decl.,
2 Ex. G at 3 (describing bestiality video, photos of naked women, and emails containing racial
3 slurs and epithets)). Plaintiff argues that he did not technically send the video containing
4 bestiality, but rather it was sent by someone else, and that ATF does not have a policy against
5 using profanity in email. Opp'n at 21. The Court notes these evidentiary disputes are
6 immaterial; the Court does not rely on the truth of the statements contained in the IAD report
7 on investigation (issued October 25, 2010), the PRB's suspension recommendation (issued
8 March 2, 2011), or the actual imposition of suspension by ATF's "deciding official" (issued
9 July 28, 2011). Rather, the Court notes that each document was authored by a person other
10 than one of Plaintiff's supervisors. *See* Machnonis Decl., Ex. G (authored by A. Michelle
11 Collen and Robert A. Schmitt); Ex. H (authored by B. Todd Martin); Ex. I (authored by G.
12 Elaine Smith). Plaintiff presented no evidence that establishes a "nexus" between the
13 purported discriminatory or retaliatory animus allegedly held by his supervisors and the acts
14 of the relevant investigators and decision makers involved with his suspension. *Vasquez v.*
15 *Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). Plaintiff offered no evidence that
16 could establish that these deciding officials had "knowledge of prior conflicts" involving
17 Plaintiff. Moreover, the IAD report of investigation was issued October 25, 2010, more than
18 two months before the January 6, 2011 EEO amendment cited by Plaintiff. Thus, Plaintiff
19 did not establish his prima facie case. Summary judgment is GRANTED as to Plaintiff's
20 retaliation claim involving his six-day suspension.

21 **14. Plaintiff's Application to Become the RAC of ATF's Reno Field Office.**

22 Plaintiff asserts that he was retaliated against when he was denied a supervisory
23 promotion to become the Resident Agent in Charge of the Reno Field Office. Plaintiff
24 asserts he applied for the Reno RAC position around April 2011 and was placed on the Best
25 Qualified List, but was later removed from the BQL and thus disqualified from consideration.
26 SAC ¶¶ 136-140. Plaintiff fails to establish a causal link between his protected activity and
27 removal from consideration for the Reno RAC position.

28

1 As of July 28, 2011, ATF's independent deciding official suspended Plaintiff for six
2 days. Based on Plaintiff's testimony in the Holloway case, in which IAD issued a report of
3 investigation, the PRB recommended on June 20, 2011 that Plaintiff's employment with ATF
4 be terminated. Machonis, Exs. D-E. Defendant presented undisputed evidence that Mark
5 Chait, Assistant Director of Field Operations at ATF ("AD Chait"), had discretion under the
6 ATF Merit Promotion Plan to disqualify an applicant based on derogatory information
7 provided by the Office of Professional Responsibility and Security Operations, including
8 information about a pending disciplinary action against an applicant. Declaration of Mark
9 Chait ("Chait Decl."), ¶¶ 2-4 & Ex. A, ATF Merit Promotion Plan at ¶ 57(b)(3). AD Chait
10 averred that OPRSO provided him with information that Plaintiff was the subject of pending
11 discipline issued by the PRB, and on that basis, AD Chait disqualified Plaintiff from
12 consideration of the Reno RAC position, notifying him of the disqualification on September
13 16, 2011. Chait Decl. ¶ 6 & Ex. B. Plaintiff's brief offered no evidence that AD Chait knew
14 about (much less took into account) any of Plaintiff's protected activity. *Vasquez*, 349 F.3d
15 at 640; *Cohen*, 686 F.2d at 796 ("Essential to a causal link is evidence that the employer was
16 aware that the plaintiff had engaged in the protected activity"). Even if Plaintiff had
17 submitted such evidence and were able to establish a *prima facie* case (which he has not),
18 Plaintiff presented no evidence that AD Chait's legitimate, non-discriminatory reason (the
19 existence of pending discipline) was pretext for disqualifying Plaintiff. Accordingly,
20 summary judgment as to this claim is GRANTED.

21

22 **IV. Monetary Damages for Retaliation Under the Rehabilitation Act**

23 Defendant moved for summary adjudication with respect to Count IV (retaliation
24 stemming from the Rehabilitation Act) to the extent Plaintiff seeks money damages. Mot. at
25 25. Plaintiff failed to address this argument in his opposition brief. Prior to oral argument,
26 the Court asked Plaintiff whether he conceded that summary judgment would be appropriate
27 on this issue. During oral argument, Plaintiff asserted that he did not concede this issue and
28 cited several cases in support of his position.

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1 Defendant cites *McCoy v. Department of the Army*, 789 F. Supp. 2d 1221, 1234 (E.D.
2 Cal. 2011) for the proposition that compensatory damages are not available for retaliation
3 claims under the Rehabilitation Act. In that case, the district court relied on two controlling
4 Circuit cases. The first case, *Ferguson v. City of Phoenix*, held that because the remedies for
5 violations of the ADA and the Rehabilitation Act are co-extensive with each other, and are
6 linked to Title VI of the Civil Rights Act of 1964, the ADA and Rehabilitation Act remedies
7 must be construed the same as remedies under Title VI. 157 F.3d 668, 673 (9th Cir. 1998)
8 (citing 42 U.S.C. § 12133 & 29 U.S.C. § 794a(a)(2)). The second case, *Alvarado v. Cajun
9 Operating Company*, held that “punitive and compensatory damages are not available for
10 ADA retaliation claims.” 588 F.3d 1261, 1269 (9th Cir. 2009). Combining the holdings of
11 *Ferguson* and *Alvarado*, the *McCoy* district court held that “it appears that in this circuit
12 compensatory damages are not available for retaliation under the Rehabilitation act.”
13 *McCoy*, 789 F. Supp. 2d at 1234.

14 During oral argument, Plaintiff directed the Court to *Herrera v. Giampietro*, No. 1:09-
15 CV-01466-OWWSKO, 2010 WL 1904827, at *9 (E.D. Cal. May 10, 2010). In that case, the
16 district court held that a plaintiff may be entitled to monetary damages for her ADA
17 retaliation claim against a public school district. The *Herrera* court distinguished *Alvarado*
18 because the defendant in *Herrera* was a school district, which was a public entity, governed
19 by 42 U.S.C. § 12133 whereas the defendant in *Alvarado* was a private entity governed by 42
20 U.S.C. § 12117. Citing *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002), the *Herrera* court
21 held that the remedies available pursuant to section 12133 are coextensive with the remedies
22 available in a private cause of action brought under Title VI of the Civil Rights Act of 1964,
23 which include monetary damages. Thus, based on *Herrera*, Plaintiff here could argue that
24 the Rehabilitation Act’s retaliation provision, when applied to public entities such as the
25 ATF, allow for monetary damages. However, as the specific issue of whether monetary
26 damages are available for retaliation claims under the Rehabilitation Act has not been
27 decided by the Circuit, and this issue was not fully briefed by the parties, the Court finds that
28

1 granting summary judgment on this issue to Defendants at this time would be inappropriate.

2 Summary judgment as to this issue is therefore DENIED.

3

4 **CONCLUSION**

5 For the reasons set forth above, the Defendant's motion for summary judgment is
6 GRANTED as to Count I (the ADEA cause of action), Count II (the Rehabilitation Act cause
7 of action), and all claims within Counts III and IV (retaliation), with the exception of the
8 retaliation claim relating to the January 2006 transfer to Sacramento, for which summary
9 judgment is DENIED.

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11 **IT IS SO ORDERED.**

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13 Dated: 09/23/13



14
15 THELTON E. HENDERSON, JUDGE
16 UNITED STATES DISTRICT COURT
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